

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

EMILIA OLGUIN,

Plaintiff,

v.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,

Defendant.

Case No. CV 08-6548-JEM

MEMORANDUM OPINION AND ORDER  
REVERSING DECISION OF  
COMMISSIONER AND REMANDING FOR  
PAYMENT OF BENEFITS

**PROCEEDINGS**

On October 28, 2008, Emilia Olguin ("Plaintiff" or "Claimant") filed a complaint seeking review of the decision by the Commissioner of Social Security ("Commissioner") denying her claim for disability insurance benefits under Title II of the Social Security Act. The Commissioner filed an Answer on February 9, 2009. On June 22, 2009, the parties filed a Joint Stipulation ("JS").

The matter is now ready for decision. After reviewing the pleadings, transcripts, and administrative record ("AR"), the Court concludes that the Commissioner's decision should be reversed and remanded for an immediate award of benefits.

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## BACKGROUND

Plaintiff is a 50 year old female who has the following severe impairments: cubital tunnel syndrome, cervical spine musculoligamentous strain, and depressive disorder. (AR 16.)

Plaintiff alleges an onset date of July 29, 2005. (AR 14.)

Plaintiff's claims were denied initially on November 20, 2006, and on reconsideration on March 20, 2007. (*Id.*) Plaintiff filed a timely request for hearing on April 30, 2007. (*Id.*) She appeared and testified at a hearing before the ALJ on January 16, 2008, in Los Angeles, California. (*Id.*)

The ALJ issued an unfavorable decision on March 6, 2008. (AR 11-28.) The ALJ concluded that Claimant has not been under a disability within the meaning of the Social Security Act from July 29, 2005, through the date of this decision. (AR 14.)

The ALJ determined that Claimant suffers from the severe impairments of fibromyalgia, cubital tunnel syndrome, cervical spine musculoligamentous strain, and depressive disorder. (AR 16.) The ALJ also determined that Claimant is unable to perform her past relevant work but is capable of performing other work. (AR 26-28.)

Plaintiff filed a timely request for review of the ALJ's unfavorable decision, which was denied by the Appeals Council on August 12, 2008. (AR 1-4.)

## DISPUTED ISSUES

As reflected in the Joint Stipulation, the disputed issues that Plaintiff is raising as grounds for reversal and remand are as follows:

1. Whether the ALJ erred in weighing the treating source evidence?
2. Whether the ALJ erred in evaluating Plaintiff's subjective complaints?
3. Whether the ALJ erred in determining Plaintiff's residual functional capacity ("RFC")?

## STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether the ALJ's findings are supported by substantial evidence and whether the proper legal standards were applied. *DeLorme v. Sullivan*, 924 F.2d 841, 846 (9th Cir. 1991). Substantial evidence means "more than a mere scintilla' but less than a preponderance." *Saelee v.*

1 Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson v. Perales, 402 U.S. 389, 401  
2 (1971)).

3 Substantial evidence is “such relevant evidence as a reasonable mind might accept as  
4 adequate to support a conclusion.” Richardson, 402 U.S. at 401 (internal quotations and  
5 citations omitted). This Court must review the record as a whole and consider adverse as well  
6 as supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).  
7 Where evidence is susceptible to more than one rational interpretation, the ALJ’s decision must  
8 be upheld. Morgan v. Comm’r, 169 F.3d 595, 599 (9th Cir. 1999). “However, a reviewing court  
9 must consider the entire record as a whole and may not affirm simply by isolating a ‘specific  
10 quantum of supporting evidence.’” Robbins, 466 F.3d at 882 (quoting Hammock v. Bowen, 879  
11 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007).

## 12 DISCUSSION

13 The Court concludes that the ALJ’s determination that Claimant is not disabled is  
14 unsupported by substantial evidence. The ALJ’s rejection of the fibromyalgia RFC of  
15 rheumatologist Dr. Salick was not supported by clear and convincing or specific and legitimate  
16 reasons based on substantial evidence. An impartial vocational expert concluded that Plaintiff  
17 was unable to work based on the limitations that Dr. Salick specified in his RFC. (AR 55-57.)  
18 The ALJ’s discrediting of Plaintiff’s testimony about the severity of her pain was not supported  
19 by specific, clear and convincing reasons.

20 Plaintiffs’ evidence, which must be credited, requires a finding of disability. As there are  
21 no outstanding issues to be resolved, benefits must be awarded.

### 22 A. The Sequential Evaluation

23 The Social Security Act defines disability as the inability “to engage in any substantial  
24 gainful activity by reason of any medically determinable physical or mental impairment which  
25 can be expected to result in death or . . . can be expected to last for a continuous period of not  
26 less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Commissioner has  
27 established a five-step sequential process to determine whether a claimant is disabled. 20  
28 C.F.R. §§ 404.1520, 416.920.

1 The first step is to determine “whether the claimant is presently engaging in substantially  
2 gainful activity.” Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is engaging  
3 in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert, 482 U.S. 137,  
4 140 (1987). Second, the ALJ must determine whether the claimant has a severe impairment or  
5 combination of impairments. Parra, 481 F.3d at 746. An impairment is not severe if it does not  
6 significantly limit the claimant’s ability to work. Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir.  
7 1996). The ALJ, however, must consider the combined effect of all the claimant’s impairments  
8 on his or her ability to function, regardless of whether each alone is sufficiently severe. Id.  
9 Also, the ALJ must consider the claimant’s subjective symptoms in determining severity. Id.

10 Third, the ALJ must determine whether the impairment is listed, or equivalent to an  
11 impairment listed, in Appendix I of the regulations. Parra, 481 F.3d at 746. If the impediment  
12 meets or equals one of the listed impairments, the claimant is presumptively disabled. Bowen,  
13 482 U.S. at 141.

14 Fourth, the ALJ must determine whether the impairment prevents the claimant from  
15 doing past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001). If the  
16 claimant cannot perform his or her past relevant work, the ALJ proceeds to the fifth step and  
17 must determine whether the impairment prevents the claimant from performing any other  
18 substantial gainful activity. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000).

19 The claimant bears the burden of proving steps one through four, consistent with the  
20 general rule that, at all times, the burden is on the claimant to establish his or her entitlement to  
21 benefits. Parra, 481 F.3d at 746. Once this prima facie case is established by the claimant,  
22 however, the burden shifts to the Commissioner to show that the claimant may perform other  
23 gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). In this case, the  
24 ALJ determined that Claimant was unable to perform her past relevant work. Thus, the  
25 Commissioner had the burden to prove that Plaintiff may perform other gainful activity.

#### 26 **B. The ALJ Erred In Concluding That Plaintiff Is Not Disabled**

27 Plaintiff was diagnosed with fibromyalgia in 2002. (AR 257, 261.) In 2004, she suffered  
28 a fall at work that resulted in cubital tunnel syndrome (elbow nerve injury) and cervical spine

1 musculoligamentous strain. (AR 16-17, 163, 164.) Dr. Salick, a rheumatologist, opined that the  
2 injuries caused by the fall at work aggravated Claimant's fibromyalgia. (AR 416.) Plaintiff also  
3 came to suffer depressive disorder because of inability to get relief from her pain. (AR 16, 19.)  
4 These physical and mental impairments are undisputed (AR 116), as is her inability to return to  
5 her previous work. (AR 26.) The issue before the Court is whether the combination of  
6 Claimant's impairments prevent her from other gainful activity. The Commissioner had the  
7 burden on this issue. The ALJ failed to meet that burden because the ALJ's determination that  
8 Plaintiff could engage in alternative employment did not consider her fibromyalgia.

9 Ninth Circuit cases have determined that fibromyalgia can be disabling. Benecke v.  
10 Barnhart, 379 F.3d 587, 589-90 (9th Cir. 2004). In Benecke, the Ninth Circuit described  
11 fibromyalgia as follows:

12 Benecke suffers from fibromyalgia, previously called fibrositis, a  
13 rheumatic disease that causes inflammation of the fibrous connective tissue  
14 components of muscles, tendons, ligaments, and other tissue. See, e.g.,  
15 *Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech, Inc.*,  
16 125 F.3d 794, 796 (9th Cir. 1997); *Brosnahan v. Barnhart*, 336 F.3d 671,  
17 672 n. 1 (8th Cir. 2003). Common symptoms, all of which Benecke  
18 experiences, include chronic pain throughout the body, multiple tender  
19 points, fatigue, stiffness, and a pattern of sleep disturbance that can  
20 exacerbate the cycle of pain and fatigue associated with this disease. See  
21 *Brosnahan*, 336 F.3d at 672 n. 1; *Cline v. Sullivan*, 939 F.2d 560, 563 (8th  
22 Cir. 1991). Fibromyalgia's cause is unknown, there is no cure, and it is  
23 poorly understood within much of the medical community. The disease is  
24 diagnosed entirely on the basis of patients' reports of pain and other  
25 symptoms. The American College of Rheumatology issued a set of agreed-  
26 upon diagnostic criteria in 1990, but to date there are no laboratory tests to  
27 confirm the diagnosis. See *Jordan v. Northrop Grumman Corp.*, 370 F.3d  
28 869, 872 (9th Cir. 2004); *Brosnahan*, 336 F.3d at 672 n. 1.

1 Id.; see also Harman v. Apfel, 211 F.3d 1172 (9th Cir. 2000) (reversing ALJ decision denying  
2 benefits for fibromyalgia); Bunnell v. Sullivan, 947 F.2d 341 (9th Cir. 1991) (upholding benefits  
3 for fibrositis, now known as fibromyalgia).

4 Jordan v. Northrop Grumman Corp., 370 F.3d 869, 877 (9th Cir. 2003), a case in which  
5 benefits were denied for fibromyalgia, recognized that the accepted diagnostic test is that  
6 Plaintiff must have pain in 11 of 18 tender points. See also Rollins v. Massanari, 261 F.3d 853,  
7 855 (9th Cir. 2001) (11 of 18 tender points). Objective tests such as myelograms are  
8 administered to rule out other diseases and alternative explanations for the pain but do not  
9 establish the presence or absence of fibromyalgia. Jordan, 370 F.3d at 873, 877. It cannot be  
10 objectively proved. Id. at 877. The symptoms can be worse at some times than others. Id. at  
11 873. The Ninth Circuit recognizes fibromyalgia as a physical rather than a mental disease. Id.

12 In this case, Plaintiff's fibromyalgia was undisputed. A rheumatologist, several treating  
13 orthopedists, and other medical professionals who examined Plaintiff after the 2004 fall  
14 acknowledged her fibromyalgia. (AR 166, 182, 219, 257, 261, 265, 298, 361, 415-16.) The  
15 ALJ determined that Plaintiff had the severe impairment of fibromyalgia. (AR 16.) Plaintiff  
16 repeatedly and consistently complained to all medical sources of pain in her shoulders and  
17 neck, muscle spasms, burning sensations, headache, fatigue, disturbed sleep, and soreness all  
18 over her body. (See, e.g., AR 108, 166, 177, 186, 194, 203, 419.) These are common  
19 symptoms of fibromyalgia. She also reported difficulty walking, standing, and sitting for  
20 sustained periods of time. (AR 35, 42, 398, 409.) She was prescribed the following  
21 medications for her pain: Lyrica, Cymbalta, Neurontin, Tramadol, Baclofen, Efflexor, Celebrex,  
22 Ibuprofen, and Ultram. (AR 42, 43, 112, 169, 318.)

23 Claimant had to cease work because of her pain. One orthopedist put her off work (AR  
24 174) and another, her primary treating orthopedist, Dr. Sabbag, evaluated Plaintiff repeatedly  
25 as "temporarily totally disabled." (AR 181, 187, 195, 204, 206, 214.) Dr. Salick, the only  
26 rheumatologist to see her, also concluded that she was temporarily totally disabled (AR 417)  
27 and later conducted an RFC, finding restricted functioning that the vocational expert Lynne  
28 Tracy testified would render her unable to work. (AR 55-57.)

1 Unfortunately, because Plaintiff's injuries from the 2004 fall were industrial and her  
2 fibromyalgia was considered a preexisting non-industrial condition, she was seen by a series of  
3 orthopedists, psychologists, and psychiatrists primarily focused on her workers' compensation  
4 claim for cubital tunnel syndrome and cervical spine strain. She was not seen by a  
5 rheumatologist initially. Responding to a request for a rheumatological consult, the employer's  
6 claim representative on June 8, 2006, replied, "Please note that fibromyalgia is not an accepted  
7 body part on an industrial causation and your request for a consultation with a qualified  
8 rheumatologist is denied." (AR 199.) Dr. Sabbag replied on June 26, 2006, that the issue of  
9 whether fibromyalgia may be industrially caused would be best answered by a rheumatologist  
10 because "[t]he causation of fibromyalgia is beyond my expertise." (AR 192.) Dr. Sabbag again  
11 told the claims representative on November 22, 2006, "I have previously opined and continue to  
12 believe that a rheumatology evaluation for the fibromyalgia would be helpful." (AR 305.) He  
13 wrote the claims representative on December 20, 2006, that "Ms. Olguin is plagued primarily by  
14 fibromyalgia." (AR 308.) On March 20, 2007, Dr. Sabbag wrote that Claimant's "primary  
15 problem continues to be rheumatologic in nature and not orthopedic." (AR 313.) On March 29,  
16 2007, Dr. Sabbag wrote that Plaintiff's fibromyalgia is her "dominant problem and is best treated  
17 by a rheumatologist . . . In terms of impairment, it is not clear to me how fibromyalgia should be  
18 rated." (AR 316.)

19 As a result, even though her treating orthopedic physician regarded her primary problem  
20 as fibromyalgia, it was not until August of 2007 that she finally was seen by a rheumatologist,  
21 Dr. Salick. He is an Assistant Professor of Clinical Medicine at the UCLA School of Medicine, a  
22 Senior Attending Physician at Cedars-Sinai and a QME. (AR 422.) He confirmed that Claimant  
23 had fibromyalgia. (AR 416.) He performed three tenderpoint examinations. (AR 401, 403,  
24 413-14.) Plaintiff had 18 of 18 tenderpoints on two occasions and 14 of 18 tenderpoints on a  
25 third examination. (*Id.*) He conducted an electrodiagnostic test and lab tests to rule out  
26 conditions other than fibromyalgia. (AR 415-16.) He also conducted a sleep disorder test.  
27 (AR 417.) Dr. Salick conducted a fibromyalgia RFC (AR 397-99), concluding that Plaintiff had  
28 limitations that the vocational expert later testified would render her unable to work. (AR 55-



57.) Dr. Salick was the only rheumatologist who provided medical evidence in this case on Claimant's fibromyalgia and its impact on her ability to work. Nonetheless, the ALJ rejected Dr. Salick's opinion and gave it little weight.

### 1. The ALJ Erred In Rejecting Dr. Salick's Testimony

The ALJ's rejection of Dr. Salick's testimony was not based on clear and convincing or specific and legitimate reasons supported by substantial evidence. A treating physician's diagnosis is entitled to greater weight than that of non-treating physicians. Reddick v. Chater, 157 F.3d at 715, 725 (9th Cir. 1998); Smolen, 80 F.3d at 1285. If uncontradicted, the ALJ may not reject the treating doctor's opinion without clear and convincing reasons supported by substantial evidence. Reddick, 157 F.3d at 725. Even if contradicted, the ALJ may not reject the treating physician's opinion without specific and legitimate reasons supported by substantial evidence. Id. In this case, rheumatology is the relevant specialty. Benecke, 379 F.3d at 594. A specialist's opinion is given greater weight on medical issues related to his or her specialty than a non-specialist. Id. In this case, Dr. Salick's opinion and RFC on fibromyalgia and its impact on Plaintiff's ability to work was uncontradicted.

The ALJ notes that a treating physician's opinion can be rejected if it is brief and conclusory with little in the way of clinical findings. (AR 24.) Dr. Salick's diagnosis and assessment of fibromyalgia was anything but brief and conclusory. He reviewed the entire medical record, which consisted of 500 pages. (AR 412.) Three times, he conducted the tenderpoints analysis that is the accepted method for diagnosing fibromyalgia. (AR 401, 403, 413-14.) He conducted an electrodiagnostic test and lab tests to rule out possible conditions other than fibromyalgia. (AR 415-16.) He tested Claimant's sleep disorder. (AR 417.) He also completed an RFC on fibromyalgia that no other treating or examining physician did. (AR 397-99.) Dr. Salick did everything a rheumatologist could be expected to do in assessing Claimant's fibromyalgia and its impact on her ability to work. Dr. Salick was the only physician who considered all the medical evidence in doing his RFC assessment, in that he accepted without comment the restrictions specified by the orthopedists and mental health professionals for



1 Plaintiff's other physical and mental impairments and then assessed her limitations resulting  
2 from fibromyalgia that the other medical sources never considered.

3 The ALJ must provide clear and convincing or specific and legitimate reasons supported  
4 by substantial evidence for rejecting Dr. Salick's opinion, which is the only evidence in the  
5 record from a rheumatologist, the appropriate specialty for fibromyalgia. At no point does the  
6 ALJ recognize the importance of the distinction between Dr. Salick and the other non-  
7 rheumatological medical sources who did not consider the impact of fibromyalgia on Plaintiff's  
8 functioning. Some of those medical sources openly admitted their lack of expertise in  
9 evaluating fibromyalgia. (AR 192, 298, 391.)

10 The ALJ's first basis for rejecting Dr. Salick's RFC assessment is that Dr. Salick "found  
11 little in the way of objective findings to support his restrictive functional assessment" (AR 24)  
12 "beyond several fibromyalgia tenderpoints" (AR 23). This assertion fails as a matter of law.  
13 There are no laboratory tests to confirm a diagnosis of fibromyalgia. Benecke, 379 F.3d at 589-  
14 90. The diagnosis is based on a patient's reports of pain. Id. The accepted diagnostic test is  
15 at least 11 of 18 tenderpoints. Jordan, 370 F.3d at 877. Claimant had tenderness in 18 of 18  
16 tenderpoints areas on two occasions and 14 of 18 on another visit. (AR 401, 403, 413-14.)  
17 Electrodiagnostic and lab tests ruled out other possible medical conditions. (AR 415-16.) This  
18 was medical evidence of Plaintiff's fibromyalgia that no one disputes and that the ALJ  
19 characterized as "severe." It is generally the only medical evidence that is ever available to  
20 establish fibromyalgia.

21 Also, the test in the Ninth Circuit for deciding whether to accept a claimant's subjective  
22 symptom testimony turns on whether the claimant produces medical evidence of an impairment  
23 that reasonably could be expected to produce pain or other symptoms alleged. Reddick, 157  
24 F.3d at 722; Smolen, 80 F.3d at 1282; Cotton v. Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986);  
25 Bunnell, 947 F.2d at 346. The Commissioner may not discredit a claimant's testimony on the  
26 severity of his or her symptoms merely because that testimony is unsupported by objective  
27 medical evidence. Reddick, 159 F.3d at 722; Bunnell, 947 F.2d at 343, 345. Because  
28 fibromyalgia cannot be confirmed by "objective" medical evidence and Claimant's testimony on

1 subjective testimony cannot be rejected for lack of objective medical evidence, the ALJ's  
2 rejection of Dr. Salick's assessment for lack of "objective findings" cannot stand. All the medical  
3 professionals in this case (and the ALJ) agreed that Claimant has fibromyalgia. Their opinions  
4 are medical evidence of an impairment that reasonably could be expected to produce  
5 Claimant's pain. The lack of objective medical evidence does not constitute a clear and  
6 convincing or specific and legitimate reason for rejecting Dr. Salick's RFC assessment.

7 The ALJ, moreover, seriously miscomprehended the medical evidence in stating, "Dr.  
8 Salick also performed an electromyogram study which yielded no signs of peripheral  
9 neuropathy or other inflammatory process and laboratory studies yielded no signs consistent  
10 with rheumatoid arthritis." (AR 23.) As Dr. Salick makes clear, these studies were done to rule  
11 out conditions other than fibromyalgia (AR 415-16), which is standard procedure in diagnosing  
12 fibromyalgia. Jordan, 370 F.3d at 873, 877. The ALJ erred in using the results of these studies  
13 to establish a lack of objective evidence of the severity of Plaintiff's pain. That was not the  
14 purpose of those studies.

15 The ALJ's next argument is that Dr. Salick's RFC is not "compatible with the record as a  
16 whole" and "is not supported by or consistent with the limitations assessed by any of the other  
17 treating, examining or reviewing sources." (AR 24, 25.) The problem with this assertion is that  
18 these other sources were orthopedists examining Claimant's other physical impairments or  
19 psychologists and psychiatrists examining Claimant's mental impairments. None of these  
20 sources were rheumatologists, the appropriate specialty for fibromyalgia. None purported to  
21 evaluate Claimant's fibromyalgia because they considered it to be non-industrial and/or beyond  
22 their expertise. Her treating orthopedist Dr. Sabbag openly admitted that fibromyalgia was not  
23 his area of expertise and repeatedly recommended that Plaintiff be approved to see a  
24 rheumatologist. (AR 192, 308, 313, 316.) Dr. Sohn, the AME who also was an orthopedist,  
25 specifically excluded fibromyalgia from his RFC assessment and deferred to a rheumatologist.  
26 (AR 298.) Psychologist Dr. Hyman disclaimed expertise about fibromyalgia and recommended  
27 that a rheumatologist examine Plaintiff. (AR 391.) Dr. Marinow, also an orthopedist, regarded  
28 fibromyalgia as non-industrial (ARE 268-69) and did not conduct the accepted examination for

1 fibromyalgia or lab tests to rule out other possible diseases or assess the impact of Plaintiff's  
2 fibromyalgia on her ability to work. (AR 256-72.) Neither did any other medical source,  
3 including the non-examining State agency medical consultants (AR 217-24, 252-53) who were  
4 not rheumatologists and did not review the full medical history. The assessment of non-  
5 examining, non-specialist sources is given less weight than that of treating and examining  
6 sources or specialists. Lester, 81 F.3d at 830-31; Smolen, 80 F.3d at 1285-86.

7 The ALJ mischaracterized the medical evidence of record. There is no inconsistency or  
8 conflict between Dr. Salick's RFC which assessed Claimant's fibromyalgia in the appropriate  
9 manner recommended by the American College of Rheumatology and the other medical  
10 sources which did not purport to do so and did not think it necessary because it was considered  
11 to be non-industrial for workers' compensation purposes. Dr. Salick's RFC is uncontradicted as  
12 to fibromyalgia and, as the only rheumatologist submitting medical evidence, his opinion as a  
13 specialist must be given greater weight as to fibromyalgia than the non-specialist medical  
14 sources.

15 The ALJ also rejected Dr. Salick's RFC because of an inconsistency within his report, in  
16 one place noting that Claimant had undergone surgery for cubital tunnel syndrome and in  
17 another place stating that Claimant had not had any surgeries for that condition. (AR 24-25.)  
18 This observation is at best a minor criticism on a historical matter unrelated to Dr. Salick's  
19 assessment of Claimant's fibromyalgia and in no way undermining of it. If the ALJ thought the  
20 record was ambiguous in a material way that might affect the disability determination, the ALJ  
21 had the duty to develop the record fully and fairly to assure that Claimant's interests are  
22 considered. Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir. 2001); Smolen, 80 F.3d at  
23 1288; Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983). The Court does not regard the  
24 inconsistency as material, nor a clear and convincing or specific and legitimate reason that  
25 could support the ALJ's rejection of Dr. Salick's testimony.<sup>1</sup>

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26  
27 <sup>1</sup> Commissioner's counsel (JS 10) cites to an apparent inconsistency in Dr. Salick's treatment  
28 notes, which indicate that "funcnt capacity show able to do lite strength work like old job." (AR 403.)  
The ALJ, however, did not cite or rely on this evidence in her decision. Even were it to be

1 The ALJ's fourth reason is that Dr. Salick's RFC is based on Claimant's inconsistent  
 2 subjective allegations that Dr. Salick accepted at face value without considering other factors,  
 3 including other medical reports and opinions as well as the vocational factors involved. (AR  
 4 25.) The ALJ mischaracterized the evidence of record. There is very little inconsistency in  
 5 Claimant's reports of her pain and ability to perform normal daily activities, as addressed in  
 6 Section 2 below. The ALJ's assertion that Dr. Salick simply accepted Claimant's subjective  
 7 allegations at face value is both untrue and irrelevant. He performed three tenderpoints  
 8 analyses, and conducted an electrodiagnostic test and lab tests to rule out causes other than  
 9 fibromyalgia. In any event, any diagnosis and RFC assessment of fibromyalgia necessarily  
 10 must be based on the patient's reports of pain. Benecke, 379 F.3d at 589-90. It cannot be  
 11 objectively proved. Jordan, 370 F.3d at 877. The record makes clear that Dr. Salick reviewed  
 12 the entire medical record and did consider the other medical reports, contrary to the ALJ's  
 13 assertion. The ALJ's assertion that Dr. Salick accepted Claimant's reports of pain without  
 14 considering other medical reports is contrary to the record and unsupported by substantial  
 15 evidence. Dr. Salick then proceeded to do an RFC on the impact of fibromyalgia on Claimant's  
 16 ability to work that none of the other medical sources ever performed. His was the only opinion  
 17 to consider all factors.

18 The ALJ erred in rejecting Dr. Salick's opinion and RFC assessment.

## 19 **2. The ALJ Erred in Discrediting Plaintiff's Subjective Condition**

### 20 **Testimony**

21 The ALJ erred in discrediting Plaintiff's subjective symptom testimony. As already noted,  
 22 Claimant produced medical evidence that reasonably could be expected to produce her pain.  
 23 The ALJ could not discredit her subjective testimony on the severity of her symptoms merely  
 24 because that testimony was unsupported by objective medical evidence. Reddick, 159 F.3d at  
 25 722; Bunnell, 947 F.2d at 343, 345. Unless there is evidence of malingering, the ALJ can reject  
 26 \_\_\_\_\_  
 27 considered here, Commissioner's counsel misapprehends the note. Dr. Salick was referring to  
 28 an August 21, 2007, report from another source. (Id.) Dr. Salick never saw Plaintiff on August 21,  
 2007 and he earlier on August 3, 2007 evaluated Plaintiff as temporarily totally disabled. (AR  
 417.) Thus, there is no inconsistency in Dr. Salick's own evaluation of Plaintiff.

1 Claimant's testimony about the severity of her symptoms only by offering "specific, clear and  
2 convincing reasons for doing so." Reddick, 157 F.3d at 722; Smolen, 80 F.3d at 1283-84. The  
3 ALJ must identify what testimony is not credible and what evidence discredits the testimony.  
4 Reddick, 157 F.3d at 722; Smolen, 80 F.3d at 1284.

5 In this case, there was no evidence of malingering. The ALJ did not find malingering or  
6 even mention it. Thus, the ALJ can reject Claimant's testimony on the severity of her pain only  
7 with "specific, clear and convincing reasons."

8 The ALJ determined that Claimant's testimony was not credible because of "significantly  
9 inconsistent statements regarding her ability to function and perform daily activities." (AR 25.)  
10 The ALJ once again mischaracterizes the record evidence. The perceived inconsistencies are  
11 not significant and, when viewed in context, are not materially inconsistent.

12 The primary evidence cited by the ALJ of "significantly inconsistent statements" by  
13 Plaintiff about her functioning is that she reported in 2006 (3E) that "she has no significant  
14 problems walking, sleeping, shopping, climbing stairs, cleaning her house, and driving." (AR  
15 25.) The ALJ also states that "she reported being able to walk for 1.5 hours or up to 4 miles,  
16 climb stairs, lift no more than 10 lbs, and sleep 8-9 hours." (AR 22.) These statements, says  
17 the ALJ, conflict with the seriously restricted functioning reported to Salick and described at the  
18 hearing. (AR 25.)

19 The ALJ mischaracterizes 3E and takes Plaintiff's comments out of context. 3E is an  
20 Exertional Daily Activities Questionnaire that Plaintiff signed on July 29, 2006. (AR 118-120.)  
21 She first states that she is prevented from carrying out her normal workday by shooting,  
22 throbbing pain from her neck through her arms and back and by burning sensations throughout  
23 her body, especially in her back and arms. (AR 118.) She next says that light household  
24 chores and driving to and from doctor appointments are done with great pain, stress, and  
25 fatigue. (Id.) She says she walks when she feels she can because it is recommended for her  
26 fibromyalgia. (Id.) She has walked 4 miles in 1 1/2 hours. (Id.) She has to climb stairs to get  
27 to her apartment which irritates the burning sensation in her legs. (AR 119.) She can lift light  
28 weight items less than 10 pounds but repetition causes pain. (Id.) She carries a grocery bag to

1 her apartment but only by holding it against her body. (Id.) She does her own shopping, but  
2 her son carries heavy items. (Id.) She does some laundry and light dusting, but her son also  
3 helps carry things to the laundry. (Id.) She drives a car about half an hour. (Id.) She does no  
4 yard work. (Id.) She has difficulty finishing housework if her fibromyalgia flares up. (AR 120.)  
5 She can sleep 8-9 hours but less than 4-5 hours if she is unable to sleep due to pain. (Id.) She  
6 requires rest periods or naps during the day of 1/2 to 2 hours. (Id.) She also stated that she is  
7 unable to focus due to pain and stress, and “some days I wake up extremely sore unable to get  
8 up right away. I require extensive stretching before and after sitting for long periods.” (Id.)

9 These comments by Plaintiff bear little resemblance to the description of them given by  
10 the ALJ. Plaintiff, moreover, was filling out a government form that asked but a limited number  
11 of questions. This was not a doctor’s exam.

12 Plaintiff’s comments are not materially inconsistent with her statements to Dr. Salick or at  
13 the hearing or at any other time. In 1E she stated, “I have pain all over my body, sharp pain on  
14 my hands and forearms.” (AR 108.) In 5E, Claimant says she needs help getting dressed.  
15 (AR 127.) In 7E, she says she needs help taking a bath or shower. (AR 136.)

16 In September 2005, Plaintiff complained of neck, shoulder, and back pain and pain in  
17 both forearms. (AR 177.) She described the pain as sharp and constant, with burning  
18 sensation, numbness, and swelling in both arms. (Id.) She reported that lifting, carrying, typing  
19 and grasping aggravates the pain. She was not responding to conservative treatment. (Id.)  
20 She continually reported chronic pain and “difficulty in maintaining a tolerable pain level” to Dr.  
21 Grewal and Dr. Dye throughout 2005. (AR 175, 171, 169, 166.)

22 Her primary treating orthopedist Dr. Sabbag noted on June 25, 2006 (very close in time  
23 to 3E), that Claimant reported persistent neck pain radiating down her arms, difficulty finding a  
24 comfortable position when trying to sleep, and that the severity of the pain waxes and wanes.  
25 (AR 203.) Therapy had been denied. (Id.) On December 20, 2006, Plaintiff told Dr. Sabbag  
26 that “the problem she has waxes and wanes” and that over the past week she had “an acute  
27 exacerbation of her fibromyalgia.” (AR 307.)  
28

1 Dr. Grewal and Dr. Dye reported in mid-2006 that Plaintiff had difficulty maintaining a  
2 tolerable pain level even with medications. (AR 330, 333, 337.) In November, Dr. Grewal and  
3 Dr. Dye reported, "She is having difficulty adjusting to this constant pain." (AR 344.)

4 She reported to psychologist Dr. Ruth Hyman on August 14, 2007, that, on a scale of  
5 one to ten, she suffered a level of ten at worst, five at best, and seven on an average day. (AR  
6 359.) Plaintiff's description of her daily activities to Dr. Hyman is remarkably similar both to 3E  
7 and the descriptions she gave to Dr. Salick and at the hearing:

8 Physically, Ms. Olguin reported suffering from pain in her neck,  
9 shoulders and lower back, as well as both of her upper and lower  
10 extremities. In addition, she experiences numbness in her right arm. She  
11 suffers from headaches three or four times per week. She also complained  
12 of episodes of loss of balance, muscle tension, excessive sweating, difficulty  
13 urinating, diarrhea, a dry mouth, and general weakness and fatigue . . .

14 Activities that cause exacerbations of her pain include remaining in  
15 any position for extended periods of time, performing repetitive activities with  
16 her hands (such as clapping in church), and anything involving physical  
17 exertion . . .

18 Ms. Olguin indicated that her pain interferes with her ability to perform  
19 her activities of daily living. For example, she can no longer blow dry her  
20 hair, as she cannot keep her arms raised up long enough to do this.  
21 Washing herself is sometimes painful for her. It now takes her longer to get  
22 dressed. She can do some light housecleaning if she works very slowly, but  
23 she can no longer vacuum her home. She tends to prepare simple meals  
24 and use paper plates more often because her pain is exacerbated by  
25 cooking activities and washing dishes. She can shop and run errands as  
26 long as she does so in short trips. She can only drive for short distances  
27 because longer trips exacerbate the pain in her arms and back. She is able  
28 to sit, stand, walk and bend if she does so slowly and takes frequent breaks,



1 but such activities “take a toll” on her body. She is not able to exercise  
2 beyond taking brief walks. Her sleep is also disrupted by her pain.

3 Dr. Hyman viewed Plaintiff’s pain as outside her expertise (AR 385, 391) and concluded that  
4 the impact of the 2004 fall on her fibromyalgia should be addressed by a rheumatologist. (*Id.*)

5 In August of 2007, she told Dr. Salick she had pain in her entire body, numbness,  
6 tingling, muscle spasms, fatigue, difficulty with daily activities, cannot sit for more than 30  
7 minutes without pain, difficulty driving for prolonged periods, morning stiffness. (AR 409.) In  
8 January of 2008, Dr. Salick reports multiple tenderpoints, morning stiffness, irritable bowel  
9 syndrome (“IBS”), chronic fatigue, non-restorative sleep and muscle weakness. (AR 397.) He  
10 reports that Plaintiff had pain throughout her body. (*Id.*)

11 There was nothing new in what she reported to Dr. Salick or mentioned at the hearing  
12 except for the IBS. The ALJ’s assertion that the pain and limited functioning described to Dr.  
13 Salick was not described to other medical sources (AR 23) is plainly contrary to the record and  
14 unsupported by substantial evidence.

15 There is no significant inconsistency in Plaintiff’s statements from 2004-2008. She  
16 repeatedly and consistently reported to medical professionals difficulty in performing daily  
17 activities, with significant difficulties in walking, sitting and standing for extended periods of time.  
18 She made clear that her problem waxed and waned, impacting her functioning more on some  
19 days than others. (AR 203, 307, 399.) According to the American College of Rheumatology, a  
20 characteristic of fibromyalgia “is the waxing and waning and intensity of the symptoms with  
21 good days and bad days.” (AR 419.) See also Jordan, 370 F.3d at 873.

22 The ALJ also questions Plaintiff’s credibility because she never received more than  
23 conservative treatment and no treating or examining source recommended surgery. These are  
24 legally inadequate reasons to find Plaintiff not credible. There is no cure or known surgical  
25 treatment for fibromyalgia. Benecke, 379 F.3d at 589-90. Treating sources, moreover, made  
26 clear that conservative treatment had not been effective. (AR 179.) It is not Plaintiff’s fault that  
27 there is no accepted, aggressive treatment protocol that could be expected to relieve her pain.  
28

1 The ALJ is also wrong that there was no event causing Plaintiff's condition to worsen. Dr.  
2 Salick determined that her fibromyalgia became worse because of the 2004 fall. (AR 416.)  
3 Plaintiff was not even approved to see a rheumatologist until 2007.

4 The ALJ erred in rejecting Plaintiff's subjective testimony on the severity of her pain. The  
5 ALJ's reasons for rejecting Plaintiff's testimony were not specific, clear or convincing or  
6 supported by substantial evidence.

7 **3. The ALJ Erred In Concluding That Plaintiff Was Able to Engage In**  
8 **Alternative Employment**

9 The ALJ, having determined that Plaintiff's severe impairments render her unable to do  
10 her past relevant work, had the burden to establish that Claimant is able to engage in  
11 alternative work. The ALJ utilized the Medical Vocational Guidelines or "grids" as a framework  
12 for decision-making. (AR 27.) The Guidelines, however, are primarily designed for exertional  
13 limitations and physical impairments, and not necessarily appropriate or sufficient for pain and  
14 other non-exertional limitations, as the ALJ recognized. *Id.*; see *Hoopai v. Astrue*, 499 F.3d  
15 1071, 1075 (2007) (grids are inapplicable when non-exertional limitations are sufficiently  
16 severe). Vocational testimony is therefore required. (*Id.*)

17 In this case, two non-exertional limitations are present – the pain from Claimant's  
18 fibromyalgia and depressive disorder. Accordingly, the ALJ posed hypothetical questions to  
19 independent vocational expert Lynne Tracy. (AR 27.) The hypotheticals posed to the  
20 independent vocational expert, however, reflect only the limitations credited by the orthopedists  
21 and mental health professionals for Plaintiff's cubital tunnel syndrome, cervical spine strain, and  
22 depressive disorder. (AR 51-54.) The sources who provided those limitations did not consider  
23 the impact of Claimant's fibromyalgia on her ability to work. It was error for the ALJ not to  
24 consider the impact of Plaintiff's fibromyalgia in his RFC decision. *Magallanes v. Brown*, 881  
25 F.2d 747, 756 (9th Cir. 1989) (hypothetical questions to vocational expert must contain all the  
26 limitations of a claimant).

27 The ALJ had a duty to develop the record fully and fairly. *Tonapetyan*, 242 F.3d at 1150.  
28 The ALJ also is required to consider whether the combination of all impairments are severe

1 enough to be disabling. A claimant's illness "must be considered in combination and must not  
2 be fragmentized in evaluating their effects." Beecher v. Heckler, 756 F.2d 693, 694-95 (9th Cir.  
3 1985) (quoting Dressel v. California, 558 F.2d 504, 508 (8th Cir. 1997). An ALJ must consider  
4 the combined effect of all of a claimant's impairments on his or her ability to function without  
5 regard to whether each alone was sufficiently severe. Smolen, 80 F.3d at 1290. The ALJ failed  
6 to consider the impact of all of Plaintiff's impairments in combination.

7 Even if Dr. Salick's RFC and Plaintiff's testimony regarding the severity of her symptoms  
8 were rejected, the ALJ's RFC would remain invalid because of the failure to consider Claimant's  
9 fibromyalgia. The ALJ had a duty to develop the record. Tonapetyan, 242 F.3d at 1150. If the  
10 ALJ had questions about Dr. Salick's opinion and RFC, the ALJ could have re-contacted  
11 Dr. Salick or requested his testimony. More importantly, the ALJ could have retained another  
12 rheumatologist. The ALJ's RFC does not meet the Commissioner's burden of persuasion.

13 The ALJ, moreover, relegated the only rheumatological evidence on the impact of  
14 Plaintiff's fibromyalgia on Claimant's RFC to a footnote. (AR 27, n.6.) Plaintiff's counsel posed  
15 hypotheticals to the vocational expert based on Dr. Salick's RFC. (AR 55-57.) The vocational  
16 expert testified that the limitations determined by Dr. Salick would render Plaintiff unable to  
17 perform any gainful activity. (Id.) This conclusion of disability deserved more than a footnote.

18 The ALJ gave no weight to the vocational expert's testimony of total disability "insofar as  
19 the hypotheticals . . . are unsupported by the record," and "[no] treating or examining source  
20 has restricted the claimant to such a degree." (AR 27, n. 6.) Again, however, these other  
21 medical sources never purported to consider the impact of Plaintiff's fibromyalgia on her ability  
22 to function and to engage in alternative work, and thus cannot constitute substantial evidence or  
23 meet the ALJ's burden as to fibromyalgia.

24 The ALJ also gave no weight to the vocational expert's disability conclusion because the  
25 ALJ regarded Dr. Salick's restrictive assessment as "not credible." (Id.) Again, the ALJ's  
26 rejection of Dr. Salick's opinion and RFC is unsupported by clear and convincing or specific and  
27 legitimate reasons based on substantial evidence.

1 The ALJ gave no weight to the vocational expert's disability determination because the  
2 limitations in the hypothetical derive from Claimant's testimony on the severity of her pain. (*Id.*)  
3 The ALJ earlier had determined that Plaintiff's subjective testimony about the severity of her  
4 pain was unsupported by medical evidence and based on inconsistencies in Plaintiff's  
5 statements about her ability to function in daily life. As already noted, these determinations  
6 were legal error and not unsupported by substantial evidence.

7 The ALJ has not met the Commissioner's burden to establish that Plaintiff is able to  
8 work. The ALJ decision does not provide legally sufficient reasons for rejecting Plaintiff's  
9 evidence and testimony regarding the severity of her pain and her functional limitations, which  
10 must be accepted. *Benecke*, 379 F.3d at 594, *Harman*, 211 F.3d at 1179.

### 11 DISPOSITION

12 The choice of whether to reverse and remand for further administrative proceedings or to  
13 reverse and remand for an immediate award of benefits is within the discretion of the Court.  
14 *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). Remand is appropriate where  
15 additional proceedings would remedy defects in the ALJ's decision and where the record should  
16 be developed more fully. *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990).

17 Where the record has been developed fully and further administrative proceedings would  
18 serve no useful purpose, the case should be remanded for an immediate award of benefits.  
19 *Benecke*, 379 F.3d at 593. More specifically, a court should credit the evidence rejected by the  
20 ALJ and remand for award of benefits if: (1) the ALJ failed to provide legally sufficient reasons  
21 for rejecting Plaintiff's evidence; (2) there are no outstanding issues to be resolved; and (3) it is  
22 clear that the ALJ would be required to find Claimant disabled if Plaintiff's evidence were  
23 credited. *Id.*

24 Here, the Court sees no purpose to remanding for further proceedings. The ALJ did not  
25 meet the Commissioner's burden to prove that Claimant is able to perform other work or  
26 provide legally adequate reasons for rejecting Plaintiff's evidence and testimony. The testimony  
27 of Dr. Salick regarding fibromyalgia and the vocational expert's disability conclusion based on  
28 Dr. Salick's limitations must be accepted. So must Plaintiff's subjective pain testimony. There

1 are no outstanding issues because, if Plaintiff's evidence is credited, the ALJ would be required  
2 to find Plaintiff disabled. Therefore, the Court finds that an award of benefits is appropriate.

3 **ORDER**

4 IT IS HEREBY ORDERED that Judgment be entered reversing the decision of the  
5 Commissioner of Social Security and remanding this matter for an immediate award of benefits.

6 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

7  
8  
9 DATED: December 2, 2009

\_\_\_\_\_/s/  
JOHN E. MCDERMOTT  
UNITED STATES MAGISTRATE JUDGE